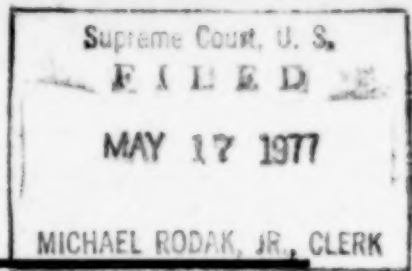


No. 76-1293



**In the Supreme Court of the United States**

OCTOBER TERM, 1976

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FRANK L. SILVERMAN, ET UX., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT*

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**MEMORANDUM FOR THE RESPONDENT  
IN OPPOSITION**

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WADE H. MCCREE, JR.,  
*Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.*

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Petitioners contend that they were not bound to the terms of stipulations agreeing to the assessment of liabilities because they claim that they entered into those stipulations under duress.

Petitioner<sup>1</sup> filed petitions in the Tax Court seeking redeterminations of deficiencies and fraud penalties totaling \$197,927.42 for the years 1960-1965 (R. A-8, A-60, A-131). He alleged, *inter alia*, that the deficiencies were barred by the statute of limitations and that they had been

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<sup>1</sup>"Petitioner" refers to Frank L. Silverman. Anna Silverman was a party to the proceedings below by virtue of having filed joint returns with petitioner for the years 1963-1965 (R. A-104 to A-105, A-114, A-121). Fraud penalties were not asserted against her (R. A-131). "R." refers to the record appendix filed in the court of appeals.

improperly computed (R. A-12, A-14, A-67, A-69, A-138 to A-139, A-141). The Commissioner responded that petitioner had failed to produce adequate books and records from which his liabilities could be determined, that the liabilities had been correctly determined by the bank deposits method, and that petitioner had been convicted of filing fraudulent income tax returns for the years 1961-1965, in violation of 26 U.S.C. 7201 (R. A-24, A-82 to A-84, A-155 to A-159, A-160).<sup>2</sup> In response to petitioner's numerous motions seeking more detailed information concerning how the liabilities were computed, the Commissioner filed amended answers (R. A-40, A-93 to A-103, A-167 to A-179). By June 13, 1973, the Commissioner had turned over to petitioner all of the material that he had concerning his computations of the deficiencies (R. A-343 to A-344). Although the Tax Court granted petitioner a series of continuances, efforts to stipulate undisputed facts failed.

When the case was called for trial on June 21, 1976, the issues had not been narrowed. The Commissioner presented schedules reflecting adjustments of the liabilities based upon documents petitioner had submitted to the Service, and petitioner was given an opportunity to challenge the items included in the schedules and to present other items. After four days of proceedings during which the parties made concessions and settled some issues, petitioner indicated a willingness to stipulate to the tax liabilities and penalties. However, petitioner thereafter declined to sign a stipulation that had been prepared with respect to one of the years (R. A-684 to A-687). The Tax Court scheduled the trial of disputed issues the next day (R. A-689). Petitioner then announced that he had decided to enter into stipulations rather

<sup>2</sup>See *United States v. Silverman*, 311 F. Supp. 485 (S.D. N.Y.), affirmed, 449 F. 2d 1341 (C.A. 2), certiorari denied, 405 U.S. 918.

than present his evidence, and he asked for a mistrial (R. A-693 to A-694). The Tax Court denied petitioner's oral motion for a mistrial and directed him to present his evidence (R. A-695, A-699). Petitioner requested a further continuance (R. A-698). Proceedings resumed eleven days later, at which time petitioner presented a few items of evidence and then stated that he wished to stipulate to the liabilities (R. A-734 to A-735).

After the Tax Court entered decisions in the total amount of \$100,085.68, based upon the stipulations, petitioner filed a motion to vacate the decisions on the ground that he had entered into the stipulations under duress (R. A-298 to A-318). The Tax Court denied the motion (Pet. App. 55), and the court of appeals affirmed (Pet. App. 46-48).

1. Petitioner renews his argument (Pet. 24-25, 38-39) that he entered into the stipulations under duress because the Tax Court forced him to sign the stipulations. While the Tax Court encouraged petitioner to settle his tax liabilities rather than litigate them, it clearly advised petitioner that he could choose instead to present his evidence at trial (R. A-671, A-688). Contrary to petitioner's argument, the Tax Court's statement that he would be called upon to present his evidence, if he chose to go to trial, hardly constitutes an improper threat; petitioner, after all, had the burden of proof with respect to liability. Tax Court Rules of Practice, Rule 142(a).<sup>3</sup> Especially, since petitioner is an attorney of many years' experience, the Tax Court's statement fell far short of duress. See *Krueger v. Commissioner*, 48 T.C. 824, 832; *Stanley v. Commissioner*, 45 T.C. 555, 561-562.

At all events, the Tax Court gave petitioner a full opportunity to prepare for trial and to present evidence.

<sup>3</sup>With respect to the issue of fraud the government had the burden of proof. See Tax Court Rules of Practice, Rule 142(b).



Petitioner sought and was granted five continuances and he filed approximately six motions seeking detailed information concerning the computations of the deficiencies (see docket entries). As a result of these delays, the trial was deferred approximately three and a half years—from December 11, 1972, the date on which the last of the petitions was filed, to July 7, 1976, the date on which petitioner decided to enter the stipulations rather than proceed with trial (see docket entries). Since the Commissioner had early in the proceedings turned over to petitioner all of the information that he had concerning the computation of the deficiencies (R. A-343 to A-344), the case was deferred for approximately three years after petitioner obtained possession of all of the pertinent information concerning the Service's position.

2. Petitioner further contends (Pet. 22-24, 27, 35-36, 38) that he was in a "state of shock" at the time he signed the stipulations and that the stipulations failed to reflect agreed adjustments for amounts he distributed to clients. But petitioner offered nothing other than his self-serving statement (R. A-305) that he was near collapse from exhaustion in support of his contention that he was in a state of shock. The stipulations, however, were entered after an 11-day recess in the presence of the Tax Court, which was in a position to determine whether petitioner was able to make a reasoned decision. In these circumstances, the Tax Court did not abuse its discretion in rejecting petitioner's unsupported assertion.<sup>4</sup>

<sup>4</sup>Petitioner's remaining contentions are likewise without merit. While he attacks (Pet. 20-21) the Tax Court's denial of his numerous motions for discovery, the Commissioner made available to petitioner all of the information which he had concerning the liabilities. Moreover, contrary to petitioner's argument (Pet. 28), the assessments here were not barred by the statute of limitations. In the case of a false or fraudulent return the tax may be assessed at any time. See Section 6501(c) of the Code. Finally, contrary to petitioner's suggestion (Pet. 37-38), there is no

It therefore is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,  
*Solicitor General.*

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requirement that the Commissioner assess a civil tax liability no greater than that set forth in an indictment for the same taxable year charging tax evasion under 26 U.S.C. 7201. The purpose of the civil assessment is to collect the full amount of taxes due, whereas the purpose of the allegation in a criminal indictment is to state the amount of income that was unreported due to fraud. See 10 Mertens, *Law of Federal Income Taxation*, §55.18, p. 109 (Doheny rev. 1976).